the trial, the Assessors should not remain in Court while the submission is argued.

It is part of the duty of a Judge at the conclusion of a trial to impress on the Assessors that they must come to their own decision on the facts and must not be influenced by any opinion the Judge may express on facts.

In deciding a submission of this nature the trial Judge must necessarily disclose his opinion on the facts of the case as far as it has gone and, if the Assessors are present, they would naturally tend to be influenced by that decision in their judgment on the facts of the whole case, if it proceeds further, and for this reason they should not be in Court.

Order Accordingly.

LIM KIM CHUAN v. PUBLIC PROSECUTOR.

[App. Cr. Juris. (Callow, J.) April 2, 1948]
[Seremban — Cr. App. No. 2 of 1948]

Rubber Supervision Enactment, S. 5(i) and S. 31 — Inadmissible evidence — Conviction — Police Investigations, when begun.

There were six grounds of appeal in five of which it was contended that the learned Magistrate erred in law in admitting hearsay evidence which was inadmissible. It was also contended in one of the grounds of appeal that the statement made to the police in the course of a police investigation was wrongly admitted and the point was made as to when the investigation should be deemed to have begun.

Held, (a) that a conviction following the admission of inadmissible evidence is not necessarily bad, where there is sufficient admissible evidence on the record to enable the Court to come to the finding it did; (b) that where a statement is made to a Police Officer in the course of the investigation it is immaterial whether the offence is seizable or non-seizable; (c) that once the suspicion of a Police Officer has been aroused to such an extent as to cause him to proceed to any action, then investigation has been commenced.

Cases referred to:—

(1) *Fong Sai Mun three others v. Public Prosecutor*, 1931-1932 F.M.S.L.R. 41.

(2) *Vellasamy v. R.*, (1941) M.L.J. 235.

MAGISTRATE'S APPEAL.

Rintoul for the Appellant.

Kilner, D.P.P., for the Respondent.

Callow, J. : — This is an appeal from the Court of the Magistrate, Jelebu, sitting at Jelebu against the conviction which resulted in a fine of $500 or 3 months r.i. in default of payment for purchasing rubber without a licence, thereby committing an offence contrary to section 5(i) of the Rubber Supervision Enactment and punishable in accordance with the provisions of section 31 of the said Enactment.

The grounds of appeal are as follows:—

(a) The Learned Magistrate erred in Law in admitting Evidence of what the witness KOH SUI (First Prosecution witness) was told by a certain Malay when such Malay was not called as a witness by the Prosecution.

(b) The Learned Magistrate erred in Law in admitting Evidence of what the witness KOH SUI (First Prosecution witness) was told by a woman, who alleged that she sold scrap rubber to the Accused when no steps were taken to indicate who such woman was.

(c) The Learned Magistrate erred in Law in admitting evidence of what a certain man (not called by the Prosecution or identified) told the witness KOH SUI regarding the sale of 300 Katties of scrap rubber.

(d) The Learned Magistrate erred in Law in admitting evidence of what a certain Lorry Attendant told the witness Wong Ying Hee (Second Prosecution witness) when such Lorry Attendant was not called as a witness.

(e) The Learned Magistrate erred in Law in admitting in Evidence what the Accused was alleged to have said to the witness Koh Sui.

(f) The Finding of the Learned Magistrate was against the weight of Evidence in that it disregards the Evidence of the witnesses Siow Thian Fatt (Third Prosecution witness) and Lee Ngee (Fourth Prosecution witness).

Grounds (a), (b), (c) and (d) all refer to the admission of evidence described by learned Counsel for the appellant as hearsay, and in respect of (a), (c) and (d) there can be no doubt at all of the inadmissibility thereof.

In ground (a) the first prosecution witness Koh Sui after saying that he "noticed a Malay carrying rubber scraps into a lorry", a piece of evidence which is perfectly admissible, went on to say what this man told him — "I asked him whose rubber it was". He said that it belonged to a Chinese living at Kuala Klawang. The "Kuala Klawang Chinese had bought the scraps from another Chinese living nearby". Had this been said in the presence of the accused, whom it would seem is referred to as the Chinaman from Kuala Klawang, it might, given certain premises, have been to some extent admissible, but in his absence, and there is nothing in the record to suggest otherwise, it is clearly flagrant hearsay.

Ground (c) is even more glaring. The record of the evidence of the same witness Koh Sui reads: "One man told me that he had "sold 300 katties of scraps to the Chinese purchaser", and the accused is pointed out as the purchaser. If this man had been called as a witness no possible objection could have been raised had he said this on oath and subjected himself to cross-examination; he was indeed material, but to give evidence of what he is alleged to have said reflects

little credit on this Police Sergeant's knowledge of the elementary rules of evidence.

Ground (d) concerns the evidence of the second prosecution witness Wong Ying Hee, another Police Officer. After saying "I saw an attendant loading the lorry with scrap rubber", and asking who was the owner, the witness went on "He told me that the scrap rubber was obtained from a woman. He said it had been purchased. The attendant said that his employer (presumably the appellant) had purchased the scrap from a woman". What powerful prosecution evidence if called! But the attendant was not called. No reason for his absence is given, yet this palpable hearsay evidence is presented to the Court.

It is possible to view ground (b) in a less heinous light. Reading the record as a whole it would seem that the woman referred to by Koh Sui (P.W.1) was the fourth prosecution witness Lee Ngee, but anything she said to the witness Koh Sui not in the presence of the accused is inadmissible. When Lee Ngee came to testify she contradicted the hearsay evidence in its most material point, that is to say, whereas the evidence of Koh Sui can be construed so as to conclude that Lee Ngee was selling rubber to the accused — the very ingredient of the charge — her evidence on oath is she was not so doing. As Mr. Rintoul for the appellant emphasised, the only result of the evidence of Lee Ngee is to show that no credibility can be attached to it.

Thus it will be observed that the result of the exclusion of the hearsay evidence (grounds (a), (b), (c) and (d)) and the failure to call the material witnesses [the Malay (ground (a)), the man (ground (b)) and the attendant (ground (c))] reduces the record to a state criticised by learned Counsel for the appellant as insufficient to foretell the verdict.

The learned Deputy Public Prosecutor replied that although hearsay evidence had been admitted, there was sufficient admissible evidence on record to enable the Court below to come to the finding it did.

I agree that a conviction following the admission of inadmissible evidence is not necessarily bad, but in this case the Magistrate founded his decision on the evidence of Prosecution witnesses 1 and 2. If the inadmissible evidence is struck out would he have had any reasonable doubt of the guilt of the accused? Would he have been forced to the conclusion recorded?

Ground (e) concerns the vexed question of a statement made to a Police Officer. The passage complained of occurs in the evidence of the first prosecution witness Koh Sui where the accused is alleged to have said "He pointed out to me several people who "were selling rubber scrap to him". That is a confession. In giving evidence the appellant refuted it. The Magistrate in his grounds of judgment relied on the evidence of prosecution witnesses 1 and 2; if this statement alleged to have been made by the accused to Detective Sergeant Koh Sui had been excluded, together with the hearsay evidence admitted in respect of the testimony of P.C. Wong Ying Hee (2 P.W.) would the finding recorded necessarily have been reached?

I am satisfied that the statement was made to the Police Officer in the course of investigation. The learned Deputy Public Prosecutor commented on the difference which should obtain between a seizable and non-seizable offence, but the case of *Fong Sai Mun and three others v. Public Prosecutor*[1] seems to dispose of this contention.

Detective Sergeant Koh Sui in the course of his evidence said he saw the accused helping to weigh rubber and he then "left to make enquiries . . . ." At that stage Police investigation began, and the prohibition contained in section 113(i) of the Criminal Procedure Code operated.

There have been many cases on this point. In my view once the suspicion of a Police Officer has been aroused to such an extent as to cause him to proceed to any action, then investigation has commenced. Another way of looking at it is to consider when mere interest changes into suspicion. "When an investigation starts must depend on the circumstances of each case" *Vellasamy v. R.*[2]. If P.C. X rounds a corner to see A running in an opposite direction and B walking towards him, and if he (P.C. X) asks B what causes A's flight, nothing having occurred to connect B with A's conduct, then if it transpires later that A was fleeing after having been robbed by B what B said to P.C. X would be admissible, for no police investigation had at that time been instituted. But here Det. Sgt. Koh Sui clearly suspected the conduct of the appellant and set out to investigate. Anything then said by the appellant to Det. Sgt. Koh Sui becomes inadmissible.

This rule of procedure has been emphasised repeatedly, and when it comes to require decision it is largely a question of fact (*Sohoni's* Code of Criminal Procedure 14th edition page 292). It cuts both ways; a prisoner is more likely to speak freely to the Police if he knows any statement he may make cannot be used in evidence; on the other hand it may deprive him of showing that his defence is consistent from the

outset in that he made a statement to the Police on the first opportunity.

In this case there can be no doubt that Det. Sgt. Koh Sui had commenced to investigate the conduct of the accused in relation to his acts with the rubber, and having so commenced he should not have adduced, nor should the Court below have received, evidence of any statement alleged to have been made by the appellant.

The last ground of appeal complains of the finding being against the weight of evidence, because it disregarded that of Siow Thian Fatt and Lee Ngee. It is certainly arguable that the Magistrate refused the sworn testimony of Lee Ngee, but accepted the hearsay evidence of what she is alleged to have told Det. Sgt. Koh Sui.

Now this is an appeal from the Court of a Magistrate who is occupied with many other duties; he is not legally qualified, and like the many other Magistrates, who between them conduct the preponderance of judicial work in the country, he manifestly seeks to administer the law to the best of his ability.

It is the duty of this Court to afford guidance, but my principal concern is to ensure that every accused person has a fair trial conducted in accordance with the procedure laid down. The guilty should be punished while the innocent and those in whose favour a reasonable doubt is found should be acquitted. I am not disposed to sacrifice justice to technicality or irregularity.

In this case the note book, Ex. P. 1, is strong evidence. If the material witnesses, whose absence I have already observed, had testified as the Police witnesses suggest, then with adherence to the strict rules of evidence a *prima facie* case might have become apparent. I make no suggestion as to the finding; the defence might have been different and found to be conclusive; but I do not regard it justice to go no further with this case. If the appellant is innocent he is entitled to discharge, and it is always incumbent upon the prosecution to prove the case beyond reasonable doubt.

This appeal is allowed. The finding and fine imposed in the Court below is set aside, and retrial is ordered in the Court of the District Judge. The fine if paid is to be refunded.

Appeal Allowed.
Retrial Ordered.

PUBLIC PROSECUTOR v. R. BALASUBRAMANIAM.

[Orig. Cr. Juris. (Callow, J.) February 17, 1947]
[Pahang — Cr. Tr. No. 19 of 1947]

Penal Code, S. 477 — Falsification of Account Book — Proof of wilful intent to defraud.

In this case the accused was charged that he being servant to the Government of the State of Pahang wilfully with intent to defraud falsified a certain book to wit a Hospital Book by omitting to enter 82 bed sheets in such book belonging to the said Government of the State of Pahang. He was tried before a Judge sitting alone. At the end of the case for the prosecution the learned Counsel for Defence submitted that no case had been made out against the accused which unrebutted would warrant a conviction, and that therefore he sought an acquittal. The learned Counsel for the Crown submitted that a **prima facia** case had been made out and that there was a case, although it might be answerable.

Held, (a) that the fact that a book is incorrect, ill-kept or misleading is not enough in itself to point irresistibly to wilful fraud; there must be conscious determination to defraud as distinguished from ignorant incompetency, and (b) that at the close of the case for the prosecution the Court must consider, even if a **prima facie** case is shown, whether all element of doubt is sufficiently removed to sustain a conviction if no more evidence is adduced.

Case referred to :—

(1) *Public Prosecutor v. Lim Teong Seng and two others* (1946) M.L.J. 108.

MAGISTRATE'S APPEAL.

B. G. Shields, Deputy Public Prosecutor for the Public Prosecutor.

Mark Morrison for the Appellant.

Callow, J. : —The accused was arraigned on three charges each contrary to section 477A of the Penal Code.

After argument, which I do not need to recapitulate, the 2nd and 3rd charges were withdrawn leaving the following :—

> "That you, between the 1st day of January, 1946, and the 31st day of December, 1946, being a servant of the Government of the State of Pahang wilfully with intent to defraud falsified a certain book to wit a Hospital Book by omitting to enter 82 Bed Sheets in such book which belonged to the said Government of the State of Pahang and thereby committed an offence punishable under section 477A of the Penal Code."

At the close of the case for the prosecution, Mr. Morrison for the accused submitted that no case had been made out against the accused which unrebutted would warrant a conviction, and that therefore he sought an acquittal.

I heard the learned Counsel for the Crown in reply and adjourned to take time to consider the argument, the evidence and the law. In coming to a